

Court No.1
RESERVED JUDGMENT

ARMED FORCES TRIBUNAL, REGIONAL BENCH,
LUCKNOW

Transferred Application No. 76 of 2016

Monday, this the 9th day of July, 2018

Hon'ble Mr. Justice SVS Rathore, Member (J)
Hon'ble Air Marshal BBP Sinha, Member (A)

Girish Dhar Dwivedi, 13690274 L NK, son of Sri Shree Dhar Dwivedi,
resident of village Lalapur, Tehsil Bara, district Allahabad.

....**Petitioner**

By Legal Practitioner : Shri Rohit Kumar, Advocate

Versus

1. Union of India through the Defence Secretary,
New Delhi.
2. Chief of Army Staff,
New Delhi
3. Colonel Administration for Officiating General Officer
Commanding, 56 APO.
4. Commanding Officer, 19 Guards, c/o 56 APO

... **Respondents**

By Legal Practitioner : Shri Asheesh Agnihotri, Addl Govt Counsel
assisted by Maj Raj Shri Nigam, OIC Legal
Cell

ORDER

“Hon'ble Air Marshal BBP Sinha (Member A)

1. Being aggrieved by order of discharge, the petitioner preferred
Writ Petition No. 33573 of 2001 in the High Court of Judicature at
Allahabad. Upon establishment of Armed Forces Tribunal, said Writ

Petition has been transferred to this Tribunal and re-numbered as T.A. No. 76 of 2016.

2. By means of the instant T.A. the petitioner has made the following prayers:

- (a) *Summon and quash the order bearing no. 04/2001 dated 01 Feb 2001 dismissing the applicant under Rule 13(3) III (V) of the Army Rules, 1954 with all consequential benefits to the applicant.*
- (b) *Quash the rejection order of the General Officer Commanding, 9 Inf Div referred in Records Brigade of Guards Kamptee letter bearing no.13690274/C-1/Lib/NE dated 06 Jul 2001 (exits on page 46 of the transferred application refers) passed on the statutory representation of the applicant under section 26 of the Army Act, 1950, with all the consequential benefits to the applicant.*
- (c) *To issue any other order or direction considered expedient and in the interest of Justice and equity.*
- (d) *Award cost of the petition.*

3. Brief facts emerging from the petition are that the applicant was enrolled in the Indian Army as soldier G.D. on 18.07.1988. The petitioner participated in OP RAKSHAK from 16.06.1992 to 14.07.1994. He was also awarded Service Medal by the Commanding Officer of 19 Guard Command. The petitioner during the period 1995 to 1999 was awarded four red ink entries and one black entry for offence under Section 63, Section 42 and Section 48 of the Army Act, 1950. While ongoing of OP VIJAY, the petitioner was warned that sine he has

earned several red ink entries and one black ink entry, he would be liable to be discharge to which the petitioner assured to mend his ways and pleaded to be retained in service. On 13.09.2000, the petitioner in an intoxicated state picked up altercation with his colleague wife and behaved violently with him. Because of his rash and annoying behaviour and his service antecedents, his continuance in service was considered to be undesirable in the interest of the service, hence he was discharged under Section 13 (3) III (V) of the Army Act, 1950. The petitioner was issued movement order and was struck off strength from the Army with effect from 01.02.2001. The petitioner preferred statutory representation before the appropriate authority which was rejected vide order dated 06.07.2001.

4. We have heard learned counsel for the parties and perused the record.

5. The solitary argument advanced by learned counsel for the applicant is that while passing the impugned order of discharge the provisions contained in the Army Order dated 28.12.1988 read with Rule 13 of the Army Rule have not been complied with. It has been submitted that no preliminary enquiry was held before passing the impugned order in pursuance to provisions contained in Army Order dated 28.12.1988 which are mandatory in nature. It is vehemently argued that mere issuance of show cause notice on the applicant would not amount to compliance of the statutory provisions of Army Order dated 28.12.1988, the non observance of which makes the impugned order unsustainable in law.

6. Per contra, learned counsel for the respondents submitted that the

in view of petitioner's service antecedents, i.e. earning four red ink entries and one black entry and subsequent behaviour of the petitioner having entered into verbal altercation with his colleague's wife and scuffle with him, he was served with a show cause notice and considering entire fact and circumstances, he was found to be an undesirable soldier and was discharged from service.

7. So far as submission of learned counsel for the petitioner is concerned, the question involved in the present O.A is no more RES INTEGRA. Admittedly, in the present case, no preliminary enquiry was held associating the petitioner as per directions contained in to Army Order dated 28.12.1988. In case, a preliminary inquiry would have been held in pursuance of Army Order dated 28.12.1988, the petitioner might have got an opportunity to defend himself and establish his case to continue in the army.

8. In Original Application No. 168 of 2013, ***Abhilash Singh Kushwaha vs Union of India***, decided on 23.09.2015, this Tribunal has held that the Army Order dated 28.12.1988 has got statutory force and merely on the basis of red ink/black ink entries, without conducting a preliminary inquiry and giving an opportunity of hearing, no army personnel could be dismissed or discharged. The relevant portion of para 75 of the judgment is reproduced as under:-

*“75. In view of above, since the petitioner has been discharged from Army without following the additional procedure provided by A.O. 1988 (supra) seems to suffer from vice of arbitrariness. **Finding with regard to***

applicability of Army Order 1988 (supra) is summarized and culled down as under:

- (i) *In view of provision contained in sub-rule 2A read with sub-rule 3 of Rule 13 of the Army Order (supra), in case the Chief of the Army Staff or the Government add certain additional conditions to the procedure provided by Rule 13 of the Army Rule 1954 (supra), it shall be statutory in nature, hence shall have binding effect and mandatory for the subordinate authorities of the Army or Chief of the Army Staff himself, and non compliance shall vitiate the punishment awarded thereon.*
- (ii) *The Chief of the Army Staff as well as the Government in pursuance to Army Act, 1950 are statutory authorities and they have right to issue order or circular regulating service conditions in pursuance to provisions contained in Army Act, 1950 and Rule 2A of Rule 13 (supra). In case such statutory power is exercised, circular or order is issued thereon it shall be binding and mandatory in nature subject to limitations contained in the Army Act, 1950 itself and Article 33 of the Constitution of India.*
- (iii) *The case of **Santra** (supra) does not settle the law with regard to applicability of Army Order of 1988 (supra), hence it lacks binding effect to the extent the Army Order of 1988 is concerned.*
- (iv) *The judgment of Jammu & Kashmir High Court and Division Bench judgment of Delhi High Court as well as provisions contained in sub-rule 2A of Rule 13 of the Army Act, 1950 and the proposition of law flowing from the catena of judgments of Hon'ble Supreme Court and High Court (supra) relate to interpretative jurisprudence, hence order in **Ex Sepoy Arun Bali** (supra) is per incuriam to statutory provisions as well as judgments of Hon'ble Supreme Court and lacks binding effect.*
- (v) *The procedure contained in Army Order of 1988 (supra) to hold preliminary enquiry is a condition precedent to discharge an army personnel on account of red ink entries and non-compliance of it shall vitiate the order. Till the procedure in Army Order of 1988 (supra) continues and remains operative, its compliance is must. None compliance shall vitiate the punishment awarded to army personnel.*
- (iv) *The procedure added by Army Order of 1988 is to effectuate and advances the protection provided by*

Part III of the Constitution of India, hence also it has binding effect.

(vii) *Order of punishment must be passed by the authority empowered by Rules 13, otherwise it shall be an instance of exceeding of jurisdiction, be void and nullity in law”.*

9. The Hon’ble Supreme Court while affirming the aforesaid proposition of law has held in the case of ***Veerendra Kumar Dubey vs. Chief of the Army Staff & ors*** (Civil Appeal (D) No. 32135 of 2015) has held that preliminary inquiry is necessary and discharge merely on the basis of red ink entries is not sustainable. For convenience sake para 12 of aforesaid judgment of the Hon’ble Supreme Court is reproduced as under:-

“12. The argument that the procedure prescribed by the competent authority de hors the provisions of Rule 13 and the breach of that procedure should not nullify the order of discharge otherwise validly made has not impressed us. It is true that Rule 13 does not in specific terms envisage an enquiry nor does it provide for consideration of factors to which we have referred above. But it is equally true that Rule 13 does not in terms make it mandatory for the competent authority to discharge an individual just because he has been awarded four red ink entries. The threshold of four red ink entries as a ground for discharge has no statutory sanction. Its genesis lies in administrative instructions issued on the subject. That being so, administrative instructions could, while prescribing any such threshold as well, regulate the exercise of the power by the competent authority qua an individual who qualifies for consideration on any such administratively prescribed norm. In as much as the competent authority has insisted upon an enquiry to be conducted in which an opportunity is given to the individual concerned before he is discharged from service, the instructions cannot be faulted on the ground that the instructions concede to the individual more than what is provided for by the rule. The instructions are aimed at ensuring a non-discriminatory fair and non-arbitrary application of the statutory rule. It may have been possible to assail the circular instructions if the same had taken away something that was granted to the individual by the rule. That is because administrative instructions cannot make

inroads into statutory rights of an individual. But if an administrative authority prescribes a certain procedural safeguard to those affected against arbitrary exercise of powers, such safeguards or procedural equity and fairness will not fall foul of the rule or be dubbed ultra vires of the statute. The procedure prescribed by circular dated 28th December, 1988 far from violating Rule 13 provides safeguards against an unfair and improper use of the power vested in the authority, especially when even independent of the procedure stipulated by the competent authority in the circular aforementioned, the authority exercising the power of discharge is expected to take into consideration all relevant factors. That an individual has put in long years of service giving more often than not the best part of his life to armed forces, that he has been exposed to hard stations and difficult living conditions during his tenure and that he may be completing pensionable service are factors which the authority competent to discharge would have even independent of the procedure been required to take into consideration while exercising the power of discharge.

In so much as the procedure stipulated specifically made them relevant for the exercise of the power by the competent authority there was neither any breach nor any encroachment by executive instructions into the territory covered by the statute. The procedure presented simply regulates the exercise of power which would, but for such regulation and safeguards against arbitrariness, be perilously close to being ultra vires in that the authority competent to discharge shall, but for the safeguards, be vested with uncanalised and absolute power of discharge without any guidelines as to the manner in which such power may be exercise. Any such unregulated and uncanalised power would in turn offend Article 14 of the Constitution”.

10. While allowing the aforesaid appeal, the Hon’ble Supreme Court has restored the appellant with continuity of service till the time he would have completed the qualifying service for grant of pension. However, no back wages were made admissible.

11. Adverting to the facts of the case on hand, having considered the arguments advanced by learned counsel for the respondents and the material placed on record, keeping in view the principles of ‘no work no pay’ we refrain from awarding back wages.

12. Accordingly, the T.A. deserves to be **allowed**; hence allowed. Discharge order dated 01.02.2001 and order rejecting the statutory representation dated 06.07.2001 are hereby set aside. Petitioner shall not be entitled to back wages. The respondents shall grant pensionary benefits along with all consequential benefits of the rank petitioner was holding at the time of passing of the impugned order of discharge. Let service pension and all consequential benefits be provided to the petitioner expeditiously, say, within four months from the date of presentation of a certified copy of this order.

No order as to costs.

(Air Marshal BBP Sinha)
Member (A)

(Justice SVS Rathore)
Member (J)

Dated : July, 2018

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